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The Women's Preventative Services Provision of the ACA and For-Profit Corporations: Must They Comply?

Introduction

The Patient Protection and Affordable Care Act [hereinafter the ACA] was signed into law by President Obama on March 23, 2010.¹ The ACA is the largest health reform legislation in decades and has the potential to provide healthcare coverage for many of the currently uninsured people in the United States as well as bring costs down for others who already have healthcare insurance.² One of the key provisions of the ACA, and arguably the most controversial, is the Women's Preventative Services Provision which includes a contraception coverage mandate for many types of group health insurance plans.³

The inclusion of the Women's Preventative Services Provision [herein after the Provision] caused an uproar, especially among social and religious conservatives who claimed that the Provision violated their religious beliefs. Almost immediately after its passage, lawsuits challenging different provisions of the ACA flooded into federal courts across the country. Many of these lawsuits focused on the alleged violation of employers' religious beliefs stemming from the Provision. This paper provides a detailed analysis of a selection of challenges against the Provision, focusing on for-profit employers' Free Exercise Clause and Religious Freedom

¹ 42 U.S.C.A. § 18001 (2010).

² *Id.*

³ *Affordable Care Act Rule on Expanding Access to Preventive Services for Women*. HEALTHCARE.GOV, <http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html>. (last updated Feb. 1, 2013).

Restoration Act [hereinafter RFRA] claims. Plaintiffs in these cases are seeking an exemption from the Provision. This paper examines the legislative and judicial history of the Free Exercise Clause and RFRA and how it applies to current challenges against the Provision. Following the analysis, this paper advocates against exemptions from the Provision for for-profit employers and ultimately for all types of employers.

Background

The congressional debate leading up to the ACA enactment was fraught with conflict, and the conflict did not end after the law was signed. Many lawmakers and citizens questioned the constitutionality of some of the key, fundamental provisions of the ACA including the individual mandate⁴ and the Medicaid expansion⁵. This led to multiple cases of litigation⁶ which culminated in the Supreme Court case *National Federation of Independent Business v.*

⁴ 42 U.S.C.A. § 18091 (2010) (The individual mandate is a basic requirement for all individuals to maintain health insurance that, at minimum, covers essential health benefits as defined by the ACA. The justification for the mandate is based on the effects individual health, in the aggregate, has on interstate commerce and the overall public health. Increased access helping individuals obtain coverage is achieved through expanded coverage requirements for employer-based insurance, a Medicaid expansion, and state exchanges); *see also* 26 U.S.C.A. § 5000A (2010) (If an individual does not maintain essential health benefits coverage, the individual is subject to a penalty); *see also* 42 U.S.C.A. § 18031 (2010) (The ACA provides an option for states to establish exchanges. Generally, the exchanges have the goal of providing competition within the individual insurance market, providing cost-saving benefits in a similar way as the group health insurance market by giving individuals the advantages of group purchasing power and provider competition.).

⁵ 42 U.S.C.A. § 1396c (2010). (The ACA included a provision that would expand Medicaid eligibility to more people, with the goal of expanding health coverage access, especially for low-income people); *see also* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (The Medicaid Expansion was not upheld in full because it had the condition that states must comply or risk losing all Medicaid funding.).

⁶ *Nat'l Fed'n*, *supra* note 5, at 2572 (This case was originally brought in Federal District Court and challenged the constitutionality of the individual mandate and the Medicaid expansion. The United States Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion provision but not the individual mandate. The Supreme Court granted certiorari.).

Sebelius brought by twenty-six different states as well as private individuals and a business organization against Kathleen Sebelius, Secretary of Health and Human Services.⁷

In an opinion written by Chief Justice Roberts, the Supreme Court upheld the individual mandate under Congress' taxing power and held there could no penalization for states refusing to participate in the Medicaid expansion.⁸ Because the penalization provision was ruled severable from the Medicaid expansion itself, the ACA was effectively upheld as constitutional, and implementation proceeded.⁹ Implementation of the ACA is gradual with different provisions becoming effective each year to allow a more functional transition. Some of the earliest provisions to take effect involved allowing young adults to stay on their parent's insurance plan until the age of twenty-six and prohibiting lifetime limits on insurance coverage.¹⁰ By 2014, many individual consumers who do not have insurance through employment will be able to shop for insurance through state exchanges, lowering the cost for individuals by creating a separate marketplace.¹¹

One of the most important provisions of the ACA is the Provision. The Provision requires all new private health plans to cover eight different categories of preventative health services without cost-sharing including, "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling as prescribed by a health care provider."¹² The fact that the Provision applies to all new private

⁷ *Id.* at 2572.

⁸ *Id.* at 2607.

⁹ *Id.* at 2608.

¹⁰ *What's Changing and When*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/timeline/index.html> (last visited Apr. 27, 2013).

¹¹ *Id.*

¹² *Affordable Care Act Rules on Expanding Access to Preventive Services for Women*, HEALTHCARE.GOV, <http://www.healthcare.gov/news/factsheets/2011/08/womensprevention08012011a.html> (last updated Feb. 1, 2013).

health plans means that private employers' group health plans are subject to compliance beginning with the enrollment of new plans after August 1, 2012.¹³ Certain religious employers, described as "tax-exempt organizations whose mission is the teaching of religious values primarily to members of their own faith through employees of their own faith," are exempt from the provision.¹⁴

While the debate continues as to who exactly qualifies for an exemption, a key factor is an employer's status as a non-profit.¹⁵ There are no exemptions proposed for for-profit corporations. This paper does not advocate for any exemptions from the Provision, but it is clear how churches or other organizations with a specifically religious purpose may feel entitled to make Free Exercise or RFRA claims regarding the mandates of the Provision. However, for-profit corporations do not have this same entitlement because of their inherently secular nature and profit-seeking mission. Therefore, despite the continuously increasing amount of litigation being pursued against the Provision from all types of employers, this paper focuses on the claims

¹³ *Id.* For example, the new requirements are triggered when employees are hired and enrolled in the employer-based health insurance after August 1, 2012. The requirements are triggered for existing employees in any insurance enrollment period on or after August 1, 2012.

¹⁴ FREDERICK MARK GEDICKS, WITH RELIGIOUS LIBERTY FOR ALL: A DEFENSE OF THE AFFORDABLE CARE ACT'S CONTRACEPTION COVERAGE MANDATE 3 (American Constitution Society, Oct. 2012).

¹⁵ *Women's Preventative Services Coverage and Religious Organizations*, CCHIO, <http://cciiio.cms.gov/resources/factsheets/womens-preven-02012013.html> (last visited Apr. 27, 2012).

of for-profit corporations.¹⁶

Some owners of for-profit corporations feel they should also be able to claim exemption from the Provision, and they have brought litigation seeking injunctions from the enforcement of the provision. Most of the litigation is based on claims under the Free Exercise Clause of the First Amendment and RFRA. The purpose of the Free Exercise Clause is to protect religious liberty from being prohibited by the government. The neutrality and generality of the law in question determines the appropriate level of scrutiny meaning, “a law that is both neutral and generally applicable need only be rationally related to a legitimate government interest to survive a constitutional challenge.”¹⁷ Conversely, “if a law that burdens religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest.”¹⁸

The history of Free Exercise litigation guides First Amendment interpretation and the development of other law based on religious liberty. One of the most important cases in Free

¹⁶ *Overview of the Lawsuits Challenging the Affordable Care Act's No Cost-Sharing Contraceptive Coverage Benefit*, NATIONAL WOMEN'S LAW CENTER, <http://www.nwlc.org/overview-lawsuits-challenging-affordable-care-act%E2%80%99s-no-cost-sharing-contraceptive-coverage-benefit> (last visited Apr. 27, 2013). This paper focuses on lawsuits brought by for-profit corporations, but litigation is also being pursued by non-profits. According to the National Women's Law Center, as of April, 2013, there have been sixty-one different lawsuits challenging the Provision; thirty-three of those have been brought by non-profit organizations whereas twenty-eight lawsuits have been brought by for-profit corporations. Because many non-profit organizations qualify for a safe harbor, meaning they have a year allowing non-compliance with the Provision before enforcement begins, many of those cases have been dismissed because of standing and ripeness issues.

¹⁷ *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006).

¹⁸ *Id.* at 649; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored.”).

Exercise history is *Wisconsin*, a case involving an Amish group claiming they should be entitled to an exemption from the state requirement of school attendance until the age of sixteen.¹⁹ The court found that the government did have a compelling interest in educating citizens, but balanced that interest with the Amish, religiously-based way of life finding that the Amish education system had measurable value, leading to the conclusion that the Amish system would not only contribute to the overall government goal of educating citizens but also would have little effect on altering that goal.²⁰ As a result, the Supreme Court affirmed the lower court's finding that the Amish group was entitled to an exemption from the state school attendance requirement.²¹

While this case seemed like a victory for religious exemptions from state law, the Supreme Court has not always ruled in favor of religious groups claiming a Free Exercise violation. In a controversial opinion, the Supreme Court in *Smith* ruled in favor of the government in a dispute about firing employees for misconduct due to religious use of peyote at work.²² The court focused on the difference between a law targeting a specific religious practice and a law that was generally applicable, with Justice Scalia's opinion emphasizing, "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate".²³ It followed that since the law

¹⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁰ *Id.* at 212-14; *see also* GEDICKS, *supra* note 14, at 16-17.

²¹ *Wisconsin*. 406 U.S. at 236.

²² *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872 (1990).

²³ *Id.* 878-79; *see also* THOMAS C. BERG, *THE FIRST AMENDMENT THE FREE EXERCISE OF RELIGION CLAUSE: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 61-63 (2008).

prohibiting use of peyote was generally applicable and validly neutral, the plaintiffs could not be exempt from compliance, and their Free Exercise claim failed.²⁴

The *Smith* decision left many religious groups feeling vulnerable about the direction of Free Exercise Clause litigation.²⁵ By emphasizing the compelling interest of the government, groups felt the Supreme Court was, “exposing religious conduct to generally applicable laws, it seemed to threaten core religious exercise in countless situations...”²⁶ These implications served as the impetus for religious and civil-liberties groups to join together and lobby Congress for more assurance for the protection of religious liberty.²⁷ These efforts resulted in the enactment of the Religious Freedom and Restoration Act (RFRA).²⁸

RFRA is a federal law that is targeted at emphasizing the role of the government showing a compelling interest in a law that burdens religious practice.²⁹ RFRA forbids government from, “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”³⁰ RFRA was originally intended to apply both to state and federal government, but in *City of Boerne* the court found that Congress exceeded its enforcement powers enacting RFRA by overriding statute and local law, saying that only the Court could delineate the rights within the Constitution.³¹ RFRA has since been

²⁴ *Smith*, 494 U.S. at 890.

²⁵ BERG, *supra* note 23, at 19.

²⁶ *Id.* at 19.

²⁷ *Id.* at 20.

²⁸ *Id.*; *see also* 42 U.S.C. §2000bb (1993).

²⁹ BERG, *supra* note 23, at 19-20.

³⁰ 42 U.S.C. §2000bb-1(a), (b) (1993).

³¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* BERG, *supra* note 23, at 20.

amended to apply only to federal law.³² Because the ACA is a federal law, it is permissible for owners of for-profit corporations to bring litigation claims under RFRA.

Current Cases

The Supreme Court and United States Courts of Appeals have yet to address the merits of whether or not for-profit corporations may claim exemptions from the Provision under Free Exercise Clause or RFRA arguments; several Federal Districts Courts and United States Courts of Appeals have heard cases seeking injunctions against the provision with varying results.³³ Because the cases are at the procedural stage of seeking a preliminary injunction, the holdings are not the final rulings on the merits. In deciding whether or not to grant a preliminary injunction, courts are generally weighing the likelihood of the plaintiff's success on the merits along with other factors.³⁴ Plaintiffs are aware that litigation could continue for years, so they

³² *Flores*, 521 U.S. at 532.

³³ *Overview. supra* note 16. According to data from the National Women's Law Center, there have been twenty-eight cases brought by for-profit corporations challenging the Provision. Of those, only one has reached the merits, in the government's favor in district court, but it is pending appeal. Six cases have resulted in a denial for any temporary relief from the Provision, and eighteen cases have resulted in some form of temporary relief, meaning a preliminary injunction or stay pending appeal. The United States Courts of Appeals have not reached the merits of any of these cases, and the Supreme Court has denied a request for an emergency injunction but has not yet reached any further analysis on the issue.

³⁴ There is a four part test for whether a preliminary injunction should be granted which includes

- 1) whether the plaintiff will probably succeed on the merits; 2) whether irreparable harm to the plaintiff would result if the injunction is not granted; 3) the balance of harms between the plaintiff and defendant if the injunction is allowed; an 4) whether the injunction will have an impact on the public interest.

U.S. Magistrate Judge Morton Denlow, *The Motion for A Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 497-98 (2003). However, some courts weigh the factors differently or do not include all four factors in their analysis. *Id.* at 498; *see also* *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (The four factors provide a flexible, relative test where "no single factor is determinative.").

are simply seeking relief for compliance with the Provision while litigation proceeds and before a final ruling is held. One of the most publicized of these cases is *O'Brien v. U.S. Dept. of Health & Human Services*.³⁵ This involved the Catholic owner of a mining company, O'Brien Industrial Holdings, LLC. (OIH), bringing action for injunctive relief against the Provision.³⁶ O'Brien claimed compliance with the provision was against his religious belief and impermissibly violates the Free Exercise Clause and RFRA.³⁷

O'Brien argued that his religious beliefs are extended to his corporation, and that under the holding of *Citizens United*, his corporation has religious liberties in the same manner as he does in his capacity as an individual.³⁸ In regards to O'Brien's RFRA claim, the court did not focus on whether or not a corporation has religious beliefs; it focused on the weight of the burden on the exercise of religion.³⁹ The court cited *Midrash Sephardi, Inc. v. Town of Surfside*, defining a substantial burden as one that "place[s] more than an inconvenience on religious exercise; a substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly" on the exercise of religion.⁴⁰ Using this definition as guidance, the court did not find the provision to substantially burden OIH's hypothetical religious beliefs because OIH can still avoid participation in using preventative services while subsidizing the services for other employees.⁴¹

³⁵ *O'Brien v. U.S. Dept. of Health & Human Service*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *stay granted*, No. 12-3357 (8th Cir. Nov. 28, 2012).

³⁶ *Id.* at 1150.

³⁷ *Id.*

³⁸ *Id.* at 1154; *see also* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342-43 (2010) (holding that corporations are entitled to First Amendment protection in the context of political speech).

³⁹ *O'Brien*, 894 F.Supp. at 1157.

⁴⁰ *Id.* at 1158, (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

⁴¹ *Id.* at 1159.

Further, the court pointed out the incoherency of O'Brien's RFRA claim noting that if subsidizing other employees' choices to purchase contraception is a substantial burden on OIH's religion, then the same argument could be made about paying OIH's employees' salaries because those dollars could then be used to purchase contraception.⁴² Emphasizing the indirect connection in O'Brien's argument, the court noted, "RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others."⁴³

The court also rejected O'Brien's Free Exercise argument because it found the provision to be facially neutral and generally applicable; thus, the appropriate standard of scrutiny is rational basis.⁴⁴ Noting the secular nature of OIH as a for-profit corporate entity, the court found no need to analyze the facts of the supposed infringement on its religion.⁴⁵ Further, the fact that employers who hold personal, individual religious beliefs were impacted by the provision does not mean that those employers were targeted by the provision.⁴⁶ Based on these findings, the court granted the defendant's motion to dismiss O'Brien's complaints.⁴⁷ Following, the United States Court of Appeals for the Eight Circuit heard O'Brien's appeal. In a somewhat unclear, one-sentence ruling, the Eight Circuit granted O'Brien's stay pending appeal.⁴⁸ The meaning of the Eight Circuit ruling and what will follow continues to develop.

⁴² *Id.* at 1160.

⁴³ *Id.* at 1159.

⁴⁴ *O'Brien*, 894 F.Supp. at 1160.

⁴⁵ *Id.* at 1161.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *O'Brien v. U.S. Dept. of Health and Human Services*, No: 12-3357 (8th Cir. Nov. 28, 2012).

The case *Conestoga Wood Specialties Corp. v. Sebelius* involved the Hahn family, owners of a for-profit corporation, seeking an injunction against the provision based on Free Exercise and RFRA claims.⁴⁹ The corporation manufactures wood cabinets, and the owners are practicing members of the Mennonite Christian religion.⁵⁰ The plaintiffs argued that their religious beliefs extend to their corporation and cite *Citizens United* to support their claim that their individual Free Exercise Rights should extend to the identity of their corporation as a separate legal entity.⁵¹ However, the court noted that previous case law has separated “purely personal” freedoms from those that are extended to corporations.⁵² Further, neither Congress nor the Supreme Court has decided the nature of the Free Exercise Clause as it applies to corporations; thus, the court assigned the Free Exercise Clause a “purely personal” status.⁵³

The court justifies its analysis of the Free Exercise Clause status for corporations by noting that the instances where the Free Exercise Clause has been extended to entities other than individuals have all involved religious organizations, not for-profit corporations which by their very nature are secular.⁵⁴ As a separate legal entity, the corporation does not have the same religious rights as the individuals who own the corporation.⁵⁵ The court adds that even if the Provision infringed upon the corporation’s hypothetical religious exercise, it would find the Provision neutral, generally applicable, and appropriately inclusive; thus, rational basis scrutiny would apply and the provision would be upheld.⁵⁶

⁴⁹ *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 12-2673(6th Cir.).

⁵⁰ *Id.* at *3.

⁵¹ *Id.* at *5, citing *Citizens United*, 558 U.S.

⁵² *Id.* at *6.

⁵³ *Id.* at *5-6.

⁵⁴ *Conestoga*, No.12-6744, at *6.

⁵⁵ *Id.* at *8.

⁵⁶ *Id.* at *8-9.

Plaintiffs also claimed the Provision violates their rights under RFRA.⁵⁷ They based this claim on that fact that, as owners, they operate Conestoga Wood Specialties according to their religious beliefs; therefore, the provision substantially burdens the exercise of their religious beliefs that teach against use of contraceptives.⁵⁸ The court found that it is not necessary to reach the materiality of whether or not the provision constitutes a substantial burden on the corporation's religious belief because the corporation, as a separate legal entity from the owners, cannot freely exercise its own religious beliefs.⁵⁹ In particular, the court noted that some limitations and regulations must result when plaintiffs chose to enter into the commercial marketplace with a for-profit corporation as opposed to choosing to make their corporation a non-profit with a religious identity.⁶⁰ If a corporation wished to have the protections of a

⁵⁷ *Id.* at *3.

⁵⁸ *Id.* at *9.

⁵⁹ *Id.* at *10.

⁶⁰ The definition of a religious employer in regards to the Provision is still in flux. According to the most recent Notice of Proposed Rulemaking, the proposed qualifications for employers eligible for accommodations is defined as one that:

1. opposes providing coverage for some or all of any contraceptive services required to be covered under Section 2713 of the PHS Act, on account of religious objection;
2. Is organized and operates as a *nonprofit* entity;
3. Holds itself out as a religious organization; and
4. self-certifies that it meet these criteria and specifies the contraceptive services for which it object to providing coverage.

Saying an employer qualifies for an accommodation means that the employer itself does not have to provide coverage for contraceptives, but the employer's employees would be provided with a separate contraceptive coverage plan, with no cost-sharing. 45 C.F.R. § 147.130(a)(1)(iv)(B). Exemptions from the Provision are already defined in a final rule and include houses of worship and churches. Employers that qualify for an exemption are not subject to the requirement that employees have a separate plan for contraceptive coverage, as are the employers qualifying for an accommodation. <http://www.whitehouse.gov/blog/2012/02/01/health-reform-preventive-services-and-religious-institutions>.

religious entity, it could have incorporated as a non-profit with a specifically religious mission instead of incorporating as a proprietary organization whose primary purpose is profit-seeking.⁶¹

The court continued that even if the corporation had separate religious liberties, the plaintiffs would have to show that there is not only a burden but also pass the threshold of showing a substantial burden on the exercise of those religious beliefs.⁶² The court did not find a showing of a substantial burden and noted that the provision does not even necessarily change whether or not employees use contraceptives stating, “it is worth emphasizing that the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga’s employees. The fact that Conestoga’s employees are free to look outside of their insurance coverage and pay for and use any contraception, including abortifacients, through the salary they receive from Conestoga, amply illustrates this point.”⁶³ Further, the burden is too indirect to be considered substantial given the multi-step process an employee has to take in order to obtain a contraceptive or abortifacient, including seeing a doctor for a prescription and taking the prescription to a pharmacy, none of which involve the employers directly.⁶⁴ Because plaintiffs did not show a likelihood for success of their Free Exercise, RFRA, and other claims, their motion for a preliminary injunction was denied.⁶⁵

Following the District Court’s ruling, Conestoga sought a stay pending appeal in the Third Circuit.⁶⁶ Noting the request for a stay pending appeal as an extreme remedy, the Third

⁶¹ *Women’s Preventive Services*. *supra* note 15 (noting the emphasis on a corporation’s status as non-profit in order to qualify for an accommodation).

⁶² *Id.* at *12-13.

⁶³ *Id.* at *13.

⁶⁴ *Id.* at *14.

⁶⁵ *Id.* at *18.

⁶⁶ *Conestoga Wood Specialities Corp. v. Sec’y of U.S. Dep’t of Health & Human Services*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013).

Circuit denied the motion.⁶⁷ The Third Circuit followed the same analysis as the District Court and found the reasoning to be sound stating “because Plaintiffs failed to prove their likelihood of success on the merits, we DENY their request for extraordinary relief.”⁶⁸

The Western District of Oklahoma made similar findings in *Hobby Lobby Stores, Inc. v. Sebelius*. Hobby Lobby is owned by the Green family who are practicing Christians, and they sought an injunction against the Provision claiming violations of religious liberty under the Free Exercise Clause, RFRA, and other law.⁶⁹ In regards to the plaintiff’s Free Exercise claim, the court, in a similar analysis as *Conestoga*, found that secular, for-profit corporations do not enjoy the entirety of individual First Amendment rights and are excluded from those rights that are considered “purely personal.”⁷⁰ The Greens may have had a stronger Free Exercise argument if Hobby Lobby Stores was a religious organization because Free Exercise rights are extended to religious organizations, but Hobby Lobby is a secular, for-profit corporation and not a religious organization.⁷¹ Because the court found that Free Exercise rights are not extended to Hobby Lobby, it did not go through the merits of the claim of a Free Exercise infringement and found this claim will likely fail.⁷²

The plaintiffs also claimed the Provision violated the corporation’s religious liberty based on the ability for the corporation to have a separate exercise of religion from the owners.⁷³ However, the court found that Hobby Lobby, as a separate legal entity from its owners, does not

⁶⁷ *Id.* at *2.

⁶⁸ *Id.* at *3.

⁶⁹ *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

⁷⁰ *Id.* at 1287-88.

⁷¹ *Id.* at 1288.

⁷² *Id.*

⁷³ *Id.* at 1291.

exercise religion.⁷⁴ In support of this finding, the court provided, “They [corporations] do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.”⁷⁵ It followed that the plaintiff’s motion for an injunction was denied.⁷⁶ Agreeing with the District Court’s findings, the Tenth Circuit denied the plaintiff’s motion for injunction, and Supreme Court Justice Sonia Sotomayor also denied plaintiff’s application for injunction, noting that the success of Hobby Lobby’s claims was not clear.⁷⁷

Because the United States Courts of Appeals have not yet reached the merits of any of the challenges against the Provision, district courts are facing complex decisions about what to follow as precedent and are reaching different conclusions. For example, the outcome *American Pulverizer* case was and continues to be influenced by the *O’Brien* case.⁷⁸ The Western District of Missouri reached a different outcome than the district courts in the above cases, in part because of the influence of the Eight Circuit in granting a stay pending appeal to *O’Brien*.⁷⁹ The plaintiffs in *American Pulverizer* identify as Evangelical Christians and challenged the Provision as being inconsistent with their religious beliefs and claimed compliance with the Provision would violate RFRA.⁸⁰

Noting the facts as similar to *O’Brien*, the court found plaintiffs would incur an injury without an injunction, the injury to plaintiffs would outweigh the injury to the public interest

⁷⁴ *Id.* at 1291.

⁷⁵ *Hobby Lobby*, 870 F. Supp. 2d, at 1291.

⁷⁶ *Id.* at 1297.

⁷⁷ *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012).

⁷⁸ *Am. Pulverizer Co. v. U.S. Dep’t of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012).

⁷⁹ *Id.* at *1 (After a phone conference with the Eight Circuit, the District Court found “the Court construes the Eight Circuit’s November 28, 2012 opinion ... has established precedent that on facts similar to those presented in *O’Brien*, Plaintiffs are like to succeed on the merits.”).

⁸⁰ *Id.* at *2.

resulting in the denial of an injunction, and that Plaintiff's RFRA claims require a deliberate investigation.⁸¹ Because of these factors, combined with influence of the *O'Brien* stay, the court found "that the balance of equities tip strongly in favor of injunctive relief in this case and that Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation."⁸² This demonstrates how, because of difference in analysis or review, district courts are reaching different conclusions for very similar challenges. This paper find the courts denying preliminary injunctions to be correct because of their analysis on Free Exercise and RFRA claims.

Analysis

As the cases above illustrate, much of the debate about whether or not for-profit corporations should be able to succeed on Free Exercise and First Amendment claims depends on whether or not a corporation has the ability to exercise religion. Employers in the above cases cited *Citizens United* as a reason to assert the validity of their corporation's religious liberty, but does *Citizens United* really mean that individuals can extend religious views to their corporation? It is true that some First Amendment protections apply to private corporations, but as described by the above case law, corporations do not enjoy all First Amendment protections, and the difference comes to down to whether or not the protection is considered purely personal or not.⁸³

Additionally, it is important to analyze how a corporation gains a religious identity and whether or not it automatically reflects its owners' respective religious beliefs. Perhaps the

⁸¹ *Id.* at *4 (The court did not find that Plaintiffs were necessarily likely to succeed on the merits of their RFRA claim, only that the question of those merits was so serious and difficult that it weighed heavily in favor of granting a preliminary injunction.).

⁸² *Id.* at *5; see also *Overview*, *supra* note 16 (According to the National Women's Law Center, further review of this decision will depend on the outcome of the *O'Brien* case.).

⁸³ *Conestoga*, No.12-6744, at *5-6.

corporation's mission statement should be taken into account or whether or not the corporation participates in any kind of religiously-based charity work or establishes a religiously-based foundation. The requirements for how a for-profit corporation adopts religious beliefs remain unclear. In contrast, there are clearer processes for non-profits wishing to claim a religious identity for special treatment or certain exemptions from federal and state law. For example, a church is granted a federal tax exemption if it qualifies under IRC 501(c)(3) as being "organized and operated exclusively for religious ... purposes ...no part of the net earnings of which inures to the benefit of any private shareholder or individual ..." and does not participate in certain political activity.⁸⁴ When considering the tax-exempt status of an entity incorporating as a religious organization, including religiously-affiliated non-profits, the IRS examines factors such as contribution to private interest and individuals.⁸⁵

The current healthcare system already gives employers, as an aggregate, a powerful position in the marketplace which greatly impacts people who obtain health insurance through their employer.⁸⁶ Employers act as an agent of healthcare provider for their employees, meaning employers take the role of choosing and purchasing the insurance plans on behalf of their employees, who are in the role of principle.⁸⁷ This agency relationship has some cost and bargaining benefits and in theory means the employer is acting in the best interest of the employee as its agent.⁸⁸ However, it also means that much of the decision-making in the

⁸⁴ 26 U.S.C.A. § 501 (2010).

⁸⁵ *Id.*

⁸⁶ Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 886 (2011) (In 2009, as many as 59% of the insured population under the age of sixty-five obtained health insurance from their employer.).

⁸⁷ *Id.* at 898.

⁸⁸ *Id.*

healthcare coverage process comes not from the employees themselves but from the employer.⁸⁹ Discussing the possibility of giving employers more power to shape the healthcare choices of their employees must necessarily be in the context of the amount of control employers already maintain because of their agency relationship with their employees.

Interpreting law as giving corporations the ability to express religious belief and practice could open the door to employers gaining even more control over the lives of their employees than they already have. For-profit corporations, in their aggregate, have a powerful position in the marketplace and can use that position to decide how to treat their employees. For one, if for-profit employers gained the ability to claim an exemption from the provision, it would, “substantially undermine the government’s compelling goals due to the very large numbers of employees who would be denied contraception coverage by such an exemption.”⁹⁰

Additionally, there are valid concerns about giving corporations the power to discriminate based on religion if those corporations are in the position to enforce certain religious beliefs over others. The American Constitution Society, a legal organization that promotes constitutional values, provides; “Federal laws prohibiting religious discrimination in employment incorporate national values that condemn an employers use of the economic leverage of current or prospective employment to penalize employers for their religious practices or to compel them involuntarily to conform to the religious practice of other.”⁹¹ When employers attempt to control the healthcare choices their employees can and cannot make based on religious beliefs, it appears identical to imposing their religious practices on their employees.

⁸⁹ *Id.*

⁹⁰ GEDICKS, *supra* note 14, at 17.

⁹¹ *Id.*

Restricting healthcare choices in regards to access to preventative services in this manner, especially given the large economic impact of for-profit corporations, is a form a social control, and it impacts women in a much more direct way than men.⁹² Further, it inherently places more value on certain religious beliefs than others. As noted by the ACLU, showing preference for one religious belief over another is contrary to our country's values; "Religious freedom means everyone is entitled to their religious beliefs. We neither rank the legitimacy of those beliefs, nor allow them to be used a license to discriminate or harm others. Dismantling the contraception rule would violate these principles."⁹³ By choosing to value certain religious beliefs over others in the context of employment, the government would be communicating the message not only that religious beliefs have inherently different value, but that it is also permissible for employers to control which religious beliefs carry more weight than others.

Instead, the government should promote the principle of religious equality by disallowing for-profit corporations from claiming a religious exemption from the Provision.⁹⁴ First, the Constitution already contains robust religious protections including the protection of prayer and preaching under the Free Speech Clause and the Free Exercise Clause of the First Amendment. These protections are reflected in the exemptions and options for religious institutions that are already available such as the grandfathered plan provision, the options of a third-party insurer,

⁹² Lisa C. Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women's Health*, 55 HOW. L.J. 731, 754 (2012).

⁹³ SARAH LIPTON-LUBET, PROMOTING EQUALITY: AN ANALYSIS OF THE FEDERAL CONTRACEPTIVE COVERAGE RULE 8 (American Civil Liberties Union, Oct. 2012).

⁹⁴ BERG, *supra* note 23, at 79-80.

and the option to terminate coverage altogether.⁹⁵ Additionally, when discussing the equality concerns that are incident to Free Exercise analysis, William Marshall, professor of law at the University of North Carolina School of Law, stated, “ a constitutional preference for religious belief cuts at the heart of the central principle of the Free Speech Clause-that every idea is of equal dignity and status in the marketplace.”⁹⁶ Not only would belief preference disproportionately favor majority religious beliefs and religious beliefs in general over other belief structures, it would create an alarming slippery slope of exemptions.⁹⁷ Considering the United States is a nation of vastly different, diverse religious traditions and belief systems, it would be virtually impossible to accommodate everyone and would necessarily involve valuing certain beliefs over others.⁹⁸

If employers are allowed the ability to choose which religious beliefs should be valued above others, it will put them in the position to be able influence their employees’ choices and favor certain employees over others. Employers’ influence could be used to select employee or even coerce employees into values and beliefs that reflect their employer’s values and beliefs. By entering into the marketplace as a secular, for-profit corporation, these employers have

⁹⁵ GEDICKS, *supra* note 14, at 13-4; *see also* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, in *THE FIRST AMENDMENT THE FREE EXERCISE OF RELIGION CLAUSE: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 79, 80 (Thomas C. Berg ed., 2008) (“Free Speech Clause includes the protection of prayer, proselytizing, preaching, and aspects of religious conscience in its ambit.”).

⁹⁶ Marshall, *supra* note 95, at 80; *see also* *Grandfathered Health Plans*. HEALTHCARE.GOV, <http://www.healthcare.gov/law/features/rights/grandfathered-plans/index.html> (last update Aug. 20, 2012) (In employer-based health insurance, a grandfathered plan is one that an employee has continuously been enrolled in since March 23, 2010 or prior to that date. Grandfathered plans do not have to immediately comply with all ACA provisions, but plans will lose their grandfathered status when significant changes are made to them such as significantly cutting or reducing benefits.).

⁹⁷ BERG, *supra* note 23, at 64; *see also* Marshall, *supra* note 95, at 79-80.

⁹⁸ BERG. *supra* note 23, at 64.

subjected themselves to certain constraints including employment discrimination laws.⁹⁹ It follows that exempting for-profit corporations from the provision, “would enable the use of employment to encourage and even to compel involuntary employee conformance with the employer’s religious practices,” and, “would fundamentally distort employment markets in favor of religious employers.”¹⁰⁰ This economic effect would parallel and exacerbate the existing impact of employees seeking out certain jobs solely for access to health insurance in general.¹⁰¹ Thus, exempting for-profits from the provision requirements would, in effect, go against employment discrimination laws while having a great impact on the large economic pull for-profit corporations have in the marketplace.

Giving the power to employers to enforce values of ranking religious belief also has negative implications for the government and superseding the role of the government. Some so-called narrower solutions that have been proposed as an alternative to the provision include requiring the government to pay for services to which employers have religious objections, such as certain contraceptives.¹⁰² Further, as noted by the American Constitution Society, “a religious

⁹⁹ GEDICKS, *supra* note 14, at 18.

¹⁰⁰ *Id.*

¹⁰¹ Moore, *supra* note 86, at 899.

¹⁰² *Hobby Lobby*, 870 F. Supp. 2d at 1285 (For example, the Plaintiffs in *Hobby Lobby* have a religious belief against drugs they believe to be abortion-causing); *see also Conestoga*, No. 12-6744, at 3* (Plaintiffs in *Conestoga Wood* have religious beliefs against all contraceptive drugs); *see also Tummino v. Hamburg*, No. 12-CV-763 ERK VVP, 2013 WL 1348656 (E.D.N.Y. Apr. 5, 2013) (In a decision ordering the FDA to provide emergency contraception on an over-the-counter basis without age restrictions, discussion noted the controversy over classifying emergency contraception as an abortifacient. While some religious groups claim emergency contraception is an abortifacient, scientific opinion, including Diana Blithe, supervisor of contraception research at the National Institutes of Health, argue that emergency contraception prevents pregnancy and does not cause abortion.).

person's right to an exemption does not include the right to demand that the government for the exemption.”¹⁰³

Even if employers could establish that their corporations had the ability to exercise religion, they would also have to overcome the compelling government interest in women's healthcare as required by both the Free Exercise Clause and RFRA¹⁰⁴. As described above, RFRA was enacted partially because interest groups felt it had become too easy for the government to override religious liberties by declaring advancement of a government interest.¹⁰⁵ However, the government has a very strong argument in regards to its interests in expanding access to women's preventative healthcare because the Provision aims to promote equality.¹⁰⁶ One of the strongest arguments for the government is the fact that the vast majority of women will use contraception at some point during their lives.¹⁰⁷ Since women make up over half the population in the United States, it follows that contraception access impacts a large proportion of the over 315 million people in the country.¹⁰⁸

In addition to looking at the numbers of contraceptive users in the United States, it is important to consider how preventative healthcare access affects different segments of the

¹⁰³ GEDICKS, *supra* note 14, at 18.

¹⁰⁴ *Smith*, 494 U.S. at 883-85 (in the context of the Free Exercise clause the compelling government interest is important because a narrowly tailored law that advances a compelling government interest can overcome strict scrutiny even if it substantially burdens religious exercise and is not neutral or generally applicable); *see also* § 2000bb-1(a) *supra* note 30, at (4) (The compelling government interest is important in RFRA analysis because under RFRA a law of general applicability that burdens religious exercise can still be struck “unless the government demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

¹⁰⁵ *Smith*, 494 U.S. at 885-86.

¹⁰⁶ LIPTON-LUBET, *supra* note 93, at 6-7.

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *State & County QuickFacts*, UNITED STATES CENSUS, <http://quickfacts.census.gov/qfd/states/00000.html> (last update Mar. 14, 2013).

population, especially when it comes to disproportionately negative impacts. One of the goals of the ACA is to alleviate healthcare disparities, and the Provision plays a large role in this effort.¹⁰⁹ First, access to preventative healthcare impacts people differently based on their gender. This is partially because economic disparities associated with spending on reproductive health; when looking at similar insurance policies for people who are the same age, women are likely to spend significantly more in out-of-pocket costs than men as a result of paying for preventative healthcare.¹¹⁰ Consequently, insurance companies are also charging women more than men for coverage because of their different preventative healthcare needs.¹¹¹

Women are also economically impacted because of the implications reproductive health access has on their ability to earn wages and succeed in careers, factors having a large impact on women's ability to achieve equality. Research indicates that access to family planning greatly influences women's choices when it comes to careers and advanced education resulting in greater access correlating with higher wages for women.¹¹² Quoting one of the most important Supreme Court decisions on reproductive health, the ACLU notes; "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹¹³ Giving more women the opportunity to choose

¹⁰⁹ *Women's Preventive Services*, *supra* note 15.

¹¹⁰ Chad Brooker, Making Contraception Easier to Swallow: Background and Religious Challenges to the HHS Rule Mandating Coverage of Contraceptives, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 169, 170 (2012); *see also* LIPTON-LUBET, *supra* note 93, at 5.

¹¹¹ Brooker, *supra* note 110, at 170.

¹¹² LIPTON-LUBET, *supra* note 93, at 6.

¹¹³ *Id.* at 6-7 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)).

their economic path promotes the government's goal of working for gender equality.¹¹⁴

Additionally, the Provision will help alleviate health disparities between men and women. Increased access to preventative health helps reduce the rates of unintended pregnancy; unintended pregnancies have long-term health effects for women and their unborn children.¹¹⁵ In his comment in the *University of Maryland Law Journal of Race, Religion, Gender and Class*, Chad Brooker states “women with unintended pregnancies are more likely than those with intended pregnancies to receive later or not prenatal care, to smoke and consume alcohol during pregnancy, and to experience domestic violence during pregnancy.”¹¹⁶ While conservative lawmakers and policymakers may attribute these disparities to lifestyle choices, research supports the finding that disparities are largely a result of unequal access to preventative health services and that women who cannot access preventative health services may not immediately realize they are pregnant, resulting in higher rates of risky behavior.¹¹⁷ The realities of the negative consequences for women resulting from health access barriers emphasize the need for the Provision because it seeks to expand access to preventative health services.

¹¹⁴ 77 Fed. Reg. 8725-01 (2012) (Referring to gender disparities: “Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force.”).

¹¹⁵

According to the Guttmacher Institute, increased contraceptive use has been found to be responsible for 77% of the decline in pregnancies amount 15 to 17-year-olds between 1995 and 2002, and for the entire decline among 18 to 19-year-olds over the same period. Increased access to contraception among publicly funded programs alone accounted for the *175 the avoidance of 1.94 million unintended pregnancies in 2006. The public funding of these services has been particularly effect among poor populations where the access to contraception has reduced the number of unintended pregnancies by half.

Brooker, *supra* note 110, at 174-75.

¹¹⁶ *Id.* at 173.

¹¹⁷ Ikemoto, *supra* note 92, at 745-50 (discussion about conservative perspective to health disparities compared to access-related research).

In addition to general gender disparities, there are also measureable disparities amongst women based on ethnicity, race, and socioeconomic income level.¹¹⁸ While unintended pregnancies generally decreased between 2001-2006, the decrease occurred largely within groups of high-income women as opposed to low-income women and women of color who saw an increase in the rate of unintended pregnancy.¹¹⁹ Because low-income women and women of color are often marginalized in other ways and may be less able to access other necessary health resources, it follows that the government has an interest in increasing access to preventative health services for these groups. The Provision aims to alleviate race, gender, and class disparities; The Department of Health and Human Services noted the government interests asserted in the Provision, “including better treatment of conditions unrelated to pregnancy for which contraceptives are often prescribed, improvement of the health of pregnant women and newborn children, reduction in the cost of employer-sponsored health care plans, reduction in workplace inequalities between men and women, and reduction in the disparate health care costs borne by men and women.”¹²⁰

In the context of the Free Exercise Clause and RFRA, the compelling government interest plays an important role, but it is not absolutely controlling. As discussed previously, a corporation’s ability to practice religious exercise is not clearly established, but if, hypothetically, a corporation could exercise the same religion as its owners, further analysis of the Free Exercise Clause and RFRA also supports the finding that for-profit corporations should be compelled to comply with the provision. First, it is helpful to examine the neutrality and

¹¹⁸ *Id.* at 749-50.

¹¹⁹ *Id.* (quoting research from the Guttmacher institute: “black women are three times as likely as white women to experience an unintended pregnancy; Hispanic women are twice as likely.”).

¹²⁰ GEDICKS, *supra* note 14, at 15; *see also* 77 Fed. Reg. 8725-01 (2012) (Increasing access to contraception furthers the compelling government interest to alleviate health disparities and promote health equality.).

general applicability of the Provision. In the cases cited, the employers generally claim the provision infringes upon the corporation's religious liberty because the owners cannot comply with the Provision without violating their religious beliefs. While validity of the owners' religious beliefs is not questioned, the American Constitution Society notes, "Free Exercise doctrine condemns only *intentional* religious discrimination, not religious burdens occurring as the incidental effect of a neutral and general law."¹²¹

Finding the general neutrality of a law is key in Free Exercise analysis.¹²² Looking strictly at the language of the Provision and the exemptions, it clearly applies to all for-profit employers equally; it does not specifically target any type of employer or target any particular religious belief.¹²³ The current legal interpretation of this part of the application of the Free Exercise Clause is derived from Justice Scalia's opinion in *Smith*, where Scalia emphasized the difference between a law intentionally infringing on one's religious beliefs and a law incidentally having a disproportionate impact on one's religious beliefs; incidental disproportionate impact means that a law is only subject to the low standard of rational basis scrutiny.¹²⁴ Richard F. Duncan, professor of law at University of Nebraska College of Law adds; "Under *Smith* and *Lukumi*, the majority may rule without any fear of religious anarchy, so long as the burdens it creates are not imposed selectively."¹²⁵

¹²¹ GEDICKS, *supra* note 14, at 5.

¹²² Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise! Smith, Lukumi, And The General Applicability Requirement*, in THE FIRST AMENDMENT THE FREE EXERCISE OF RELIGION CLAUSE: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE, 184 (Thomas C. Berg ed., 2008.).

¹²³ *Id.* at 184.

¹²⁴ Brooker, *supra* note 110, at 192 (discussing Scalia's opinion in *Smith*).

¹²⁵ Duncan, *supra* note 122, at 195 (discussing *Smith* and *Lukumi* holding a city law that specifically targeted a practice of the Santeria religion was unconstitutional).

It is important to note why women's preventative health is even being scrutinized, especially when compared to the history of regulating men's reproductive health choices. Women's health has a history of being used as a wedge issue, a tool for leverage that is continuously surrendered as unimportant in legislative and policy disputes.¹²⁶ Indeed, the issues of contraception coverage in the Provision have received the most attention of any issue in the ACA, and abortion coverage was off the table from almost the very beginning of the discussion.¹²⁷ Groups of Catholic clergy members have been some of the most outspoken opponents of the Provision and have proven influential in the accommodation discussions.¹²⁸

The strong influence of religious clergy not only harms women's health, it contributes to the perpetuation of religious belief taking precedence over strong scientific evidence.¹²⁹ Religious belief overcoming scientific evidence is particularly relevant in the context of emergency contraception, which has been described as an abortifacient despite strong scientific evidence that emergency contraception only prevents pregnancy and does not cause a termination of an existing pregnancy.¹³⁰

To compare why this is notable, it is helpful to imagine this kind of treatment being given to another subject. For example, similar to employees choosing how to use their health insurance coverage, employees also have control over how to spend their salaries in regards to their housing arrangements. The ACLU notes, "it would be hard to argue that there is a great burden on an employer's religion if an employee uses her salary to pay for an apartment where she

¹²⁶ Ikemoto, *supra* note 92, at 758-61.

¹²⁷ *Id.* at 761.

¹²⁸ Brooker, *supra* note 110, at 191-92.

¹²⁹ NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 146-47 (2006).

¹³⁰ *Id.* at 147; *see also* Tummino, No. 12-CV-763, at *1.

cohabitates unmarried with her boyfriend, contrary to her employer's religious beliefs.”¹³¹ Yet, aspects other than reproductive health choices of employees' personal lives are not given the same kind of attention and scrutiny.

Women's contraceptives were not always considered a basic part of health insurance coverage. However, this began to change during the women's reproductive health movement, which has its origins questioning the physician-patient relationship and advocating for more autonomy for women making choices about their healthcare decisions.¹³² Demands for insurance coverage increased in response to Viagra becoming a covered prescription, shortly after its development.¹³³ Prior to the enactment of the ACA, twenty-six states already mandated that for-profit employers include contraceptive coverage in their group health insurance plans.¹³⁴ Notable cases in California and New York illustrate how courts approached claims of religious liberty violation from mandated contraceptive coverage.¹³⁵

Recommendations

This paper advocates against for-profit corporations being able to claim an exemption to the Provision based on Free Exercise, RFRA, or any other claims. The district courts denying preliminary injunctions, in their initial analysis of the merits, have the correct interpretation.

¹³¹ LIPTON-LUBET, *supra* note 93, at 4.

¹³² Ikemoto, *supra* note 92, at 736.

¹³³ Brooker, *supra* note 110, at 171 (Description of women's equality movement incorporating healthcare access into agenda).

¹³⁴ *Insurance Coverage for Contraception Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES <http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx> (last visited Apr. 27, 2013).

¹³⁵ Brooker, *supra* note 110 (discussing the holdings of *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (Cal. 2004) (finding that CA law did not violate Free Exercise Clause by mandating private employers to cover contraceptive with a narrow religious employer exception) and *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006) (holding that a New York law requiring private employers to include contraceptive coverage in health insurance plans does not violate the Free Exercise Clause and is constitutional).

When courts reach the merits of these cases, they should deny plaintiff's relief from the compliance with the Provision. This paper would advocate for the elimination of all exemptions and accommodations to the Provision, but if any exemptions and accommodations are going to be finalized, they should not include for-profit corporations.

The flood of litigation stemming from the Provision reflects problems with attitudes about women's healthcare. Women's preventative healthcare, especially when it involves reproductive choices, is a constant source of controversy even decades after birth control and abortion were widely legalized. Several reasons may exist as to why women's reproductive health is always being debated. Even as other social issues progress and society continues to accept changes, contraception and abortion are under continuous attack by legislators and conservative lobbyists.¹³⁶ Consequently, one solution would be to address the philosophical and ideological origins of the views that advocate for restrictions on women's preventative health, and to try to unravel the systemic sexism that exists in regards women's health status.

Women's health is too valuable to continue to be used as a political tool. Authors Nancy Levit, professor of Law at the University of Missouri-Kansas City School of Law, and Robert R.M. Verchick, professor of law at Loyola University New Orleans College of Law, address the value of women's reproductive health in their book *Feminist Legal Theory*.¹³⁷ Discussing the impact of reproductive health, the authors stated "Yet women's ability to control their reproductive lives is about much more than whether they choose to have children. Reproductive

¹³⁶ Rachel Benson Gold & Elizabeth Nash, *State-Level 2012 Retrospective: Second-Highest Number of Abortion Restrictions Ever*, <http://rhrealitycheck.org/article/2013/01/02/2012-saw-second-highest-number-abortion-restrictions-ever> (last updated Jan 2, 2013) ("Over the course of the year, 42 states and the District of Columbia enacted 122 provisions related to reproductive health and rights. One-third of these ... sought to restrict access to abortion services.").

¹³⁷ LEVIT & VERCHICK, *supra* note 129, at 128-49.

liberty is connected to all other aspects of women's equality—the ability to hold a job, obtain an education, participate in sports, or escape gender-based violence from spouses ...”¹³⁸

Women's health should not be subject to scrutiny based on the religious beliefs of others. The government should make a point that women's health, in the context of federal law, must take precedence over religious belief. By valuing health for all people, the government acts in the best interest of all citizens no matter their religious beliefs and preserves the right for private citizens to practice their own religious beliefs in their private lives without imposing those beliefs on others who may or may not share them. By no means does this position advocate in any way for the control of religious beliefs in one's private capacity, it is simply advocating for those religious beliefs to not trump women's health in government. It is vitally important to separate the role of religion in one's private life from the role of religion in government.

Another solution would be to reexamine the way healthcare is provided in the United States. While it is true that the ACA provides significant progress in that it will cover millions of the previously uninsured population, it still is based off a mostly competitive, private market for health insurance, funneled through employers. This means that healthcare is still largely dependent on the agency relationship between employee and employer. In this dependent relationship, it becomes possible for employers to control the healthcare choices and healthcare access of their employees. In the long-term, it would be helpful to solve these seemingly endless disputes about the kinds of healthcare women deserve by transition to a single, universal payer for healthcare or at least a more centralized source that could not restrict a woman's healthcare choices based on religious beliefs or disagreements with so-called “lifestyle choices.”

¹³⁸ *Id.* at 128.

Conclusion

The enactment of the ACA represents a huge step forward for expanding access to the health coverage in the United States. It was a victory for the public as a whole and for women's rights when the Provision was added to the ACA. Expanding contraception access and breaking down barriers of cost will have positive, life-changing effects for women and their families. While the United States has a valuable cultural and legal tradition of protecting religious freedoms, that tradition cannot continue by imposing religious beliefs on others. The Provision does not threaten one's ability to exercise religion under the Free Exercise Clause or RFRA.

Further, exercise of religion is not automatically extended from an individual to that individual's for-profit corporation. Even if courts could somehow find a burden on religion caused by the generally applicable Provision, that burden must be outweighed by the government's interest in women's health. It would set an extremely dangerous precedent for women and other marginalized groups if courts turned their backs on women's health and held in favor of for-profit corporations challenging the Provision. For-profit corporations must comply with the Provision and should not be granted an exemption.